United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

No. 2 Special Calendar
October Term 1913

IN THE

Court of Appeals, District of Columbia

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED
OCT 3 1913
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Henry W. Hodges
Clerk

OCTOBER TERM, 1913.

No. 2528.

UNITED STATES, *el rel*, J. WILLIAM MCKINLEY, *Appellant*,

vs.

CHAS. S. BUNDY, *Appellee*.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

BRIEF FOR APPELLEE.

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I.

STATEMENT OF THE CASE.

This is a suit for a writ of mandamus to require the appellee, one of the judges of the Municipal Court of the District of Columbia, to approve an appeal undertaking. The court below issued a rule to show cause, and upon the coming in of the answer the rule was discharged and the petition dismissed. (Rec. 9.)

The material facts are as follows:

On a day not named in the petition (Rec. 2, fol. 1), but stated in the brief for appellant (page 2) to have been October 2, 1912, the appellant (hereinafter called petitioner) instituted a suit in replevin in the Municipal Court against one Mark. The suit came on for trial before the appellee, one of the judges of that court, who heard the same and rendered judgment therein November 1, 1912.

The petitioner alleges that he noted an appeal from the judgment and gave notice by leaving a copy at the office of Mark's attorney upon November 4, 1912, the notice stating that on November 8, 1912, the petitioner would offer his undertaking on appeal, with one Stewart as surety. (Rec. 2, fol. 2.) The fact appears to be that on the rendition of the judgment petitioner's attorney announced "that he would appeal" (Rec. 4-5, fol. 7; Rec. 6, fol. 10), but that the alleged notice of November 4, 1912, was not served on Mark's attorney (Rec. 6, fols. 10-11; Rec. 7, fol. 11), who heard nothing more of the appeal until shortly before 12 o'clock on November 9, 1912, when he received a telephone message from petitioner's attorney, stating that he was before the appellee with an undertaking, executed by the New England Casualty Company, and requesting Mark's attorney to consent to its approval, which consent was refused, on the ground that the latter had received no notice of the filing of the undertaking or of the application for its approval. (Rec. 6, fol. 10.)

The undertaking with Stewart as surety was never executed or presented for approval, and on November 9, 1912, before the hour of 12 o'clock noon, an undertaking, signed by the petitioner as principal and the New England Casualty Company as surety, was submitted to the appellee, concededly without previous notice to Mark or his attorney. On the afternoon of the last mentioned day, November 9,

at the hour of 3:30 o'clock P.M., petitioner's attorney served notice on Mark's attorney that he, petitioner's attorney, had filed the undertaking, and that he would, on November 13, 1912, at the hour of 9:45 o'clock A.M., ask the appellee to approve the same *nunc pro tunc*. The matter was held in abeyance by the appellee until November 16, 1912, at which time he refused to approve the undertaking. (Rec. 2, fols. 2-3.)

It is claimed for petitioner that the undertaking was submitted for approval within six days of the rendition of judgment, exclusive of Sundays and legal holidays: the contention being that as Saturday, November 2, and Saturday, November 9, were each a half holiday, the afternoon of the former day, as well as the whole of Sunday, November 3, must be excluded from the calculation of time, and that accordingly the six days, exclusive of Sundays and legal holidays, after the rendition of judgment did not expire until noon of November 9, 1912. And it is conceded that the notice of application for approval of the undertaking was not served upon Mark's attorney until the afternoon of November 9, 1912, or at a time beyond the expiration of the six days, even according to petitioner's contention.

II.

Argument.

1. There was no appeal in fact by the petitioner from the judgment rendered against him by the appellee.

Section 30 of the Code of Law for the District of Columbia provides that an appeal from the Municipal Court shall be "prayed within six days after the entering of the judgment"; and section 31 provides that no appeal shall be allowed unless an undertaking "be given within six days, exclusive of Sundays and legal holidays, after the entry of

judgment." It will be noted that while Sundays and legal holidays are excluded from the calculation in determining the six days within which to give an undertaking on appeal, they are not excluded from calculation in determining the time within which the appeal shall be prayed.

The record fails to show any appeal within the six days, inclusive of Sundays and legal holidays, the announcement of petitioner's attorney "that he would appeal" clearly not amounting to such: no note of the intended appeal was made by the appellee, and, beyond the bare announcement of the intention to take an appeal, no notice of any kind was given Mark's attorney until November 9, 1912, being the eighth day "after entering the judgment." Nor is the matter helped by the contention, if it be made, that the recital in the undertaking in question, "the plaintiff desiring to appeal from the judgment rendered against him," amounts to either the taking of an appeal or the noting thereof, for the obvious reason that that recital was also made on the eighth day "after the entering of the judgment."

Very clearly, there was no seasonable appeal, and therefore, in contemplation of law, no appeal by the petitioner in the premises.

2. There was no seasonable proper notice by the petitioner of the offering of the undertaking in question.

Rule 20, regulating the practice before the Municipal Court, is as follows:

> "In all cases after suit is filed, where a bond, undertaking, or security, is required by law or these rules to be approved by a Justice of the Peace, such approval shall not be made except upon two clear days' notice of application for such approval to the opposite party in interest, or waiver thereof in writing by said party, and without such notice or waiver such approval shall not be operative, and such notice shall contain the name and address of the proposed surety."

The undertaking in question was prepared on the assumption that the required notice would be waived and approval of the undertaking consented to by Mark's attorney, as clearly appears from the form of waiver and consent appended to the undertaking as presented to the appellee (Rec. 8, fol. 14); and the petitioner does not claim that he or his attorney served any notice upon Mark or his attorney until the hour of 3.30 o'clock in the afternoon of November 9, 1912 (Rec. 2, fol. 2), which notice appears, from the petitioner's own affidavit, to have been served by putting the same through the mail opening in the office door of Mark's attorney at the hour named. (Rec., 7-8.)

And, as appears from its terms, this notice was of submission of the undertaking in question on November 13, 1912, at the hour of 9:45 o'clock A.M., which, according to any method of calculation, was long after the expiration of six days, whether including or excluding Sundays and legal holidays, "after the entry of judgment." If it be conceded that the submission of an undertaking for approval within the time prescribed by the rule may be sufficient, even though the approval be made after the expiration of the time prescribed, or even that it may be sufficient to present an undertaking within the time prescribed, and to give notice according to the rule to be acted upon after the expiration of the time prescribed, this notice would not come within either concession. For, as said in Mulvihill vs. Clabaugh, 21 App. D. C., 440, 442, cited for the appellant, where a bond is simply filed and the judge is not called upon to approve it until after the expiration of the time prescribed, "and if it can be two days after, it may be thirty," the proceeding is vain, though it might be otherwise, if the bond, after due notice, were filed and submitted for approval within the prescribed time and thereafter held up for consideration as to approval by the judge.

To the same effect is Schrot vs. Schoenfeld, 23 App. D. C., 421, also cited for appellant, wherein it is held as follows:

> "While, if an appeal bond or undertaking has been presented [meaning, of course, duly presented] to the trial court in due time for approval, and such approval is for any good reason postponed beyond the time limited for the giving of the bond or undertaking, the party should not thereby be deprived of his right of appeal, yet in the case of an appeal from a judgment of a Justice of the Peace, where the record, although showing that, within the time limited for the filing of the undertaking, a notice was given, or is claimed to have been given, by the appellant, that he had filed 'a motion and bond for appeal,' the docket entries of the Justice contain no proof of the fact, but do show that thereafter and after the expiration of the time within which the undertaking might have been filed, an undertaking was filed and approved, the appeal is properly dismissed by the lower court."

This case related to an appeal from the Justices of the Peace (now the Municipal Court), whereas the Mulvihill case related to an appeal from the Supreme Court of the District of Columbia; and this court said (page 426):

> "The provision of the Code respecting appeals from Justices of the Peace to the Supreme Court of the District is even more peremptory than the rules which govern appeals to this court, and the reasoning of the *Mulvihill case* applies more strongly, if possible, to the former class of appeals than to the latter."

To which may be added that whereas the rule respecting appeals from the Supreme Court of the District of Columbia provides that the bond shall be *"filed,"* the statute respecting appeals from the Municipal Court provides that the undertaking shall be *"given,"* within the time prescribed;

and how can an undertaking be said to be "given" until that which is necessary to its completion, namely, approval, has been effected?

And in the case of Fowler vs. Quigley, 38 App. D. C., 214, also cited for appellant, both the undertaking was filed and the notice given within the prescribed time, although the undertaking was approved thereafter.

3. Neither the question of the seasonableness of the appeal, if any, nor that of the insufficiency of the notice, is affected by the fact that every Saturday afternoon is a holiday in this District.

As above shown, allowing the petitioner's contention as to the manner of computing the time in question, the six days following the entry of judgment, even excluding the intervening Sunday and Saturday afternoon, expired at noon of the terminal Saturday. As the notice of the undertaking was not given until the afternoon of that Saturday, it was clearly beyond the expiration of six days, even according to this method of calculation; and as the time limited for taking an appeal does not exclude Sundays and legal holidays, the attempted taking of the appeal was by so much the more beyond the prescribed time.

4. There is no force in the contention that no notice of the surety was necessary, for the assumed reason (Brief for Appellant, page 7) that the surety was "a corporation which was authorized to become surety upon any bonds to be given in the District of Columbia, either in judicial proceedings, or to perform some duty to the United States."

This statement in the brief is pure assumption. The petition makes no such allegation respecting the surety, and there is no evidence in the record that the surety was such corporation.

And even did the surety appear to be such as contemplated by the statute, the usual notice would still be neces-

sary, for that the undertaking as tendered professed to be executed by a person describing himself as "Resident Manager" and to bear the seal of the Surety Company. The plaintiff in the suit in the Municipal Court was clearly entitled to the prescribed two days in which to ascertain, first, whether the surety were such corporation as claimed; secondly, whether the person professing to be its Resident Manager was in fact such, and the signature purporting to be his, genuine; thirdly, whether the Company had duly qualified according to the provisions of the statute (Act of Mar. 23, 1910; 26 Stats. at L., 241); fourthly, whether its authority to act as surety in the District of Columbia remained in force; and. fifthly, whether its outstanding surety obligations were such as to make it acceptable as surety on the proffered undertaking or otherwise.

Whatever may be the duty of a Justice of the Supreme Court of the District of Columbia in taking judicial notice of the qualifications of such a surety as the company in question, a Judge of the Municipal Court may not take such notice, and is surely not obliged personally to examine the files of the Clerk's office of the Supreme Court of the District of Columbia, or other records, to inform himself in the premises.

5. In addition to the failure to show due qualification of the Company in question to act as surety in the District of Columbia, there is no allegation in the petition, and nothing whatever in the record, to show that at the time it was offered as surety on the proffered undertaking its financial condition was such as to justify its acceptance by the appellee; and for this, if for no other reason, it was proper for the court below to discharge the rule to show cause, deny the writ of mandamus, and dismiss the petition.

The judgment below should be affirmed.

Respectfully submitted,

HENRY E. DAVIS,
Attorney for Appellee.